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NO. 77-259

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

FLR CORPORATION, *Appellant*

v.

BILL BLODGETT, ET AL, *Appellee*

**Appeal From The Supreme Court Of The State Of Texas**

## JURISDICTIONAL STATEMENT

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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

FLR CORPORATION, *Appellant*

v.

BILL BLODGETT, ET AL, *Appellee*

## Appeal From The Supreme Court Of The State Of Texas

## JURISDICTIONAL STATEMENT

Appellant's appeal from the judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas entered on August 18, 1976, and the judgment of the Supreme Court of Texas refusing Appellant's application for Writ of Error declaring "no reversible error" and the overruling of Appellant's Motion for Rehearing by the Supreme Court of Texas, June 8, 1977 and submit this statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

## OPINION BELOW

The opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas is reported in 541 S.W.2d 209 and is attached as Appendix A. The denial of the Writ of Error by the Supreme Court of Texas is not reported, no opinion having been written. The orders of the Supreme Court of Texas, denying the Writ of Error declaring no reversible error and overruling Motion for Rehearing, are attached as Appendix B. Notice of appeal was filed in the Court of Civil Appeals, the Court possessed of the record, on June 17, 1977, and is attached as Appendix C.

## JURISDICTION

The jurisdiction of the Supreme Court to review this decision is conferred by *Title 28, U.S. Code § 1257 (2).*

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

*Armstrong v. Manzo, et ux,* 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) and *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

## QUESTIONS PRESENTED

Whether the District Court of Texas, by dissolving a Temporary Restraining Order of unquestioned validity, without notice or hearing (except later by telephone conference) and directly ordering the foreclosure sale of real estate, deprived Appellant of its property without due process of law contrary to the Fourteenth Amend-



ment of the Constitution of the United States; and whether that portion of *Rule 680, Texas Rules of Civil Procedure* as interpreted by the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas and the Supreme Court of Texas is in conflict with the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States

## STATUTES INVOLVED

*Rule 680, Texas Rules of Civil Procedure* (Appendix D)

*Art. 3810, Vernon's Annotated Civil Statutes of Texas* (Appendix E)

## STATEMENT

This case began by the filing of a Temporary Restraining Order (Appendix F) by Judge A. P. Allison of the 198th Judicial District Court in Bandera County, Texas, pursuant to *Rule 680, TRCP.* The Temporary Restraining Order was in proper form, was supported by the required bond, and was properly served upon the Defendants, Bill Blodgett, Trustee, and the Texas Real Estate Investment Trust, Appellees here. It temporarily enjoined and restrained, for 10 days, the Trustee from conducting a foreclosure sale and provided for a court hearing within those ten days to consider dissolving the restraint or continuing it as a temporary injunction ***pendente lite.***

The same day of the filing and service of the Temporary Restraining Order, on the oral urging of Counsel for the Defendants, the Court authorized the Trustee to start reading the Notice of Sale for foreclosure and

advised Plaintiff's (Appellant's) Counsel of a hearing to be held that same afternoon in Brady, Texas, where the Court was setting at the time, a place 125 miles (approximately) away from Bandera, Texas, where Plaintiff's representatives were located and 250 miles away from the office of Plaintiff's Counsel to which office Plaintiff's Counsel had returned after the filing of the Temporary Restraining Order with the Clerk of the Court in Bandera County, Texas. The distances involved precluded Plaintiff's Counsel and Plaintiff's representatives from being present before the Court.

Over the objection of the Plaintiff, the Court conducted a so called "telephone hearing", which was not preceded by any written application therefor. The Court considered written evidence submitted to it without the knowledge of the Plaintiff or Plaintiff's Counsel. During said "telephone hearing", the Court heard only oral argument. The Court concluded the "telephone hearing" by announcing, at 3:45 p.m., that the Temporary Restraining Order was dissolved and hanging up the telephone.

Subsequently, FLR Corporation, Appellant, filed a Petition for Chapter XI Proceeding In An Arrangement in the Bankruptcy Court for the Western District of Texas, San Antonio Division, and being authorized to do so by the Bankruptcy Judge, continued to prosecute the instant case to trial. Judgment, after jury verdict, was entered that the sale and Trustee's Deed was valid and effective to convey title to the property to Texas First Mortgage Real Estate Investment Trust, Appellee.

The controlling point in the case on trial was, in the final analysis, the validity of the sale by the Trustee, Bill Blodgett, of the real property of Appellant, variously



estimated in value in excess of $3,000,000.00 up to $8,000,000.00 for $950,000.00 to Appellee, Texas First Mortgage Real Estate Investment Trust.

Appellant, as the result of the action of the Court in ordering and taking charge of the foreclosure proceeding, was divested, by direct action of the Court, of its assets and thereby deprived of its property without due process of law.

This due process question was raised and presented in the Trial Court by argument, and in the Court of Civil Appeals for the Eighth Supreme Judicial District and in Appellant's Application for Writ of Error to the Supreme Court of Texas and in Appellant's Motion for Rehearing to the Supreme Court of the State of Texas. The question was raised in the Trial Court by protest that the action of the Trial Court in dissolving the Temporary Restraining Order was without notice, without adequate notice, without application being filed therefor and without adequate hearing thereon. The question was raised in Appellant's brief to the Court of Civil Appeals for the Eighth Supreme Judicial District as Point of Error Number Two which reads as follows:

II. THE TRIAL COURT ERRED IN GRANTING A JUDGMENT TO APPELLEE BECAUSE THE UNDISPUTED FACTS SHOW THE TRUSTEE'S SALE WAS INVALID

The question was further raised in the REPLY BRIEF FOR APPELLANT in the Court of Civil Appeals for the Eighth Supreme Judicial District where the Point of Error above cited, was restated and further briefed. It was

raised in Appellant's APPLICATION FOR WRIT OF ERROR in the Supreme Court of the State of Texas as Appellant's Fourteenth Point of Error which reads as follows:

FOURTEENTH POINT OF ERROR

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE FACTS SURROUNDING AND LEADING UP TO JUDGE ALLISON'S ORDER DISSOLVING THE TEMPORARY RESTRAINING ORDER DID NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND AMENDMENTS THERETO AND THE CIVIL RIGHTS ACT OF THE CONGRESS OF THE UNITED STATES, *42 USCA, §1983.*

The question was finally raised in APPELLANT'S MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR in the SUPREME COURT OF TEXAS wherein said FOURTEENTH POINT OF ERROR was restated and further briefed.

The question of the validity of the Trustee's Sale is controlling of the outcome of the case for the reasons the possession of the property was forceably taken without the consent of Appellant shortly after said sale and the Defendant, being thereby deprived of its single major asset, was unable to continue its business and sought the protection of the Bankruptcy Court in a Proceeding In An Arrangement for the benefit of and protection from its numerous creditors. Were the sale to be held invalid, title



and possession of the property in question would come under the jurisdiction of the Bankruptcy Court and proceedings for the disposition thereof or rehabilitation of the debtor and dividends to its many creditors, would proceed in due course.

The opinion of the Court of Civil Appeals was that because of the Trustee's Deed, your Appellant parted with its title to the property and therefor could not prevail.

Further, the Court of Civil Appeals held that the Appellant had lost possession of the real property in question and therefor, not having such possession, could not prevail in its Trespass to Try Title suit under existing Texas Law.

The questions raised herein are "fundamental error" under Texas Law which is interpreted by the Courts of the State of Texas as questions and issues that can be raised at any time during the proceeding or by the Court itself.

*Ramsey v. Dunlop,* 164 Tex. 196, 205 S.W.2d 979;
*Texas and Pacific Coal Company v. Lawson,* 89 Tex. 494, 32 S.W. 871;
*3 Tex. Jur. 2d* (§102, p. 430)

The Court of Civil Appeals, in its opinion, did not write on the questions here presented, although they were properly presented to it in Appellant's briefs. Such questions constitute "fundamental error".

The Supreme Court denied Appellant's Application for Writ of Error finding "no reversible error" and did not write an opinion.

## THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this Appeal are similar to those raised by *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) and *Sniadach v. Family Finance Company,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 249 (1969) wherein this Court clearly distinguished private action as authorized by the laws of a state and *judicial* state action which was repugnant to the Fourteenth Amendment to the Constitution of the United States. It is submitted that Appellant has had its property taken from it by the express order of a District Judge of the State of Texas acting under color of his authority as a District Judge without due process of law and without equal protection of the laws. A State Official, having previously issued a Temporary Restraining Order within his authority and valid on its face and of unquestioned import, without prior notice or any notice, in fact, ordered and authorized a private citizen, the substitute Trustee, Bill Blodgett, to violate the face of that order by commencing a substitute Trustee's sale of the valuable property belonging to the Appellant. Shortly thereafter, without any written or sworn motion or application for the dissolution thereof, that Judge received evidence from the Appellee without the knowledge of the Appellant and without the Appellant's ability to examine and cross-examine that evidence. The Court then held a "telephone hearing" and concluded the hearing by the simple expediency of hanging up, while Appellant was in mid-argument.

In *Leisure States of America, Incorporated v. Carmel Development, Et Al,* 371 Fed. Sup. 556, and *Hoffman v. United States Department of HUD, Et Al,* 371 Fed. Sup.



576, the Courts held that the mere holder of a Deed of Trust acting pursuant to contract provisions contained in the Deed *did not* become a representative of the State or political subdivision by posting notices and holding foreclosure proceedings as permitted by §3810, *Vernon's Annotated Civil Statutes,* and therefore did not violate Amendment Fourteen of the Constitution of the United States of America and the CIVIL RIGHTS ACT, 42 USCA §1983. By dictum they did conclude however, that should there have been a state involvement such as an agency or official, such a fact situation might bring the cases within the ban of the Fourteenth Amendment of the Constitution of the United States.

In *Adams v. Southern California First National Bank,* C.A. Cal., 1973, 492 Fed.2d 324, certiorari denied, 95 S.Ct. 325, 419 U.S. 106, 42 L.Ed.2d 282, the Court, in ruling on the question of repossession of secured property, states words to the effect that the support by the State of private conduct must be significant to come within the Civil Rights Act.

Another case points out that there may be a finding of "State action or action under color of State law" within the meaning of the CIVIL RIGHTS ACT when a private party's action occurred with the affirmative orders or specific approval of a State Agency. *Jackson v. Metropolitan Edison Company,* C.A. Pa. 1973, 483 Fed.2d 754, affirmed 95 S.Ct. 449, 419 U.S. 345, 42 L.Ed.2d 477.

Under the Texas deed of trust scheme, legal title to real property which is to be security for a debt, is placed in the name of a "Trustee". Upon default in payment the creditor can order the "Trustee", or his substitute, to

post notices and sell the property on the first Tuesday of the month between the hours of 10 A.M. and 4 P.M. The creditor can and usually does bid for the property. Frequently he is the only bidder and his bid is grossly inadequate.

In the event of a dispute between the creditor and the debtor as to payment or creditor's right to payment (as in this case) the debtor's only recourse is the filing of suit and, if foreclosure by Trustee's Sale is threatened, obtaining a temporary restraining order and executing a bond payable to the creditor. Within 10 days the court must conduct a hearing and, on showing of probable cause, may continue the restraint as a temporary injunction, *pendente lite*. Rule 680, T.R.C.P., *supra*.

There is no "equity of redemption" in Texas under the deed of trust scheme. The sale by the Trustee is final and divests the debtor of his property fully and finally. The bidder at the sale must produce cash or credit acceptable to the creditor. The creditor, however, as a bidder may offset the debt against his bid. When dealing with $950,000.00 or property worth in excess of $3,000,000.00 the difficulties of producing the bid in cash at the Courthouse steps of the small community of Bandera, are readily apparent.

In the instant case, Appellee agreed to loan Appellant $3,000,000.00 on the security of the property to be used for various improvements to be constructed. A dispute arose as to the quantity and quality, and therefore costs, of the improvements and Appellee, creditor, withheld $800,000 of the loan, and therefore some of the improvements could not be made as promised to prospective purchasers of lots in the subdivision. Sales of lots declined



and debtor ran into financial trouble. Although debtor hypothecated some of its contracts for sale and repaid $847,000 of the loan, creditor was unyielding in its refusal to move forward with the project and its prior commitment. While still talking settlement, creditor prepared to foreclose on the first Tuesday of the month, June 4, 1974.

Debtor, not having $1,200,000.00 in cash to pay the loan, its assets being tied up primarily in the real property, took the only course open to it under Texas law and properly applied for and obtained a restraining order. Nowhere in the case has this procedure, its propriety or legality been questioned. Creditor could, after the required hearing within the 10 days, if authorized by the Court to do so, renew its notices and foreclose on the first Tuesday of July, the next month, and recover its damages for the one month's delay out of debtor's bond. This is a time honored and well grooved procedure.

Debtor owned its primary title to its real estate subject only to its obligation to creditor, Appellee. When the negotiations broke down. Debtor had a right to apply to the Court to protect its title. The Court had discretion to issue or not to issue its restraining order. But, once issued, the Court no longer had the right to reverse itself and divest Debtor of those rights without a hearing.

In *Fuentes v. Shevin* (supra) this Court reaffirms *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780, "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situ-

ations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Fuentes v. Shevin, supra,* at 406, 32 L.Ed.2d at 571.

In this case the deprivation of Appellant's property was not temporary, as in the other cases, but was absolutely final subject only to setting the sale aside by prevailing in this suit.

In *Armstrong v. Manzo, supra,* this Court specified that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner, at 552, 14 L.Ed.2d at 66.

Rule 680, T.R.C.P., is clear as written, and it is submitted, complies with every due process requirement. It is the interpretation placed on the last sentence by the Courts in this case with which Appellant quarrels. That last sentence reads as follows:

> "On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

Here the court has apparently interpreted the words "expeditiously as the ends of justice require" to mean no meaningful notice or meaningful opportunity to be heard. It is submitted that an hour or two of notice for a hearing 250 miles away or a telephone conference call with the Judge is not "meaningful". (Appellant has found no legal precedent for a "telephone hearing")



The "ends of justice" requirement for Appellee, as the creditor, could only mean loss of one month's interest, which loss, if it occurred, was adequately covered by Appellant's bond. It is submitted that the justice requirement was not so urgent as to justify depriving Appellant and its other creditors of due process and suspend the 14th Amendment.

## CONCLUSION

This appeal raises a substantial question within procedural due process. The 14th Amendment not only applies to laws of the states, but also to how they are applied by the courts of those states. It involves substantial values in real property. It involves the interest of numerous unsecured creditors under the Bankruptcy Act.

Respectfully submitted,

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September, 1977

## APPENDIX A

### Court Of Civil Appeals Opinion

Eighth Supreme Judicial District

El Paso, Texas, August 18, 1976

Hon. Wendell S. Loomis
Attorney at Law
Esperson Building, Suite 1012
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Houston, Texas 77002

Sir:

You are hereby notified that, in the case of F L R CORPORATION, Appellant, v. BILL BLODGETT, TRUSTEE, and TEXAS FIRST MORTGAGE REIT, Appellees, our No. 6516, from Bandera County, the following decision and order was this day made and entered by the Court:

The Honorable Court of Civil Appeals today rendered judgment affirming the judgment of the trial Court.

Respectfully yours,

Anne D. Ray, Clerk

No. 6516 — F L R Corporation v. Bill Blodgett, Trustee, and Texas First Mortgage REIT, from Bandera.

## J U D G M E N T

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellees, Bill Blodgett, Trustee, and Texas First Mortgage REIT, do have and recover of and from the appellant, F L R Corporation, and its surety, Lawyers Surety Corporation, all costs in this behalf incurred, and this decision be certified below for observance.



NO. 6516

F L R CORPORATION,
Appellant,

v.

BILL BLODGETT, TRUSTEE, and
TEXAS FIRST MORTGAGE REIT,
Appellees.

Appeal from the District Court of
Bandera County, Texas

## O P I N I O N

The Appellant, F L R Corporation, presents this appeal from an adverse judgment in a trespass to try title action and suit over a trustee's deed and a cross claim for a declaratory judgment as to the validity of a trustee's deed following a foreclosure sale. We affirm.

In September, 1970, Mr. Richard Olivere obtained an option to buy the 541-acre Flying L Ranch near Bandera for $754,000.00, with a down payment of $50,-000.00 and the balance to be paid over six years. The sale was closed in June, 1971, and title was taken in F L R Corporation, a wholly owned subsidiary of 612 Corporation, in which Mr. Olivere was a stockholder and President at the time of the trial of this case. Most of the stockholders were New York investors. The property was described as a dude ranch with a landing strip, twelve cottages, a tack room, swimming pool and tennis courts at the time of the sale.

Mr. Olivere decided to fully develop the property by dividing it into lots for homesites, building the necessary

roads, adding a golf course, club house, riding stable and small lake. An additional 167 acres of adjoining land was purchased to use in the development. In order to obtain the necessary capital, F L R obtained a $3,-000,000.00 loan from Texas First Mortgage Real Estate Investment Trust (TFMR) on February 28, 1973. F L R executed a note and deed of trust along with an Assignment of Contract Rights and a Construction Loan Agreement. TFMR initially advanced $1,784,675.15 under the loan agreement. Additional advances increased the amount to $2,019,206.66. By making an assignment of Sales Contracts, F L R was able to obtain a loan in July, 1973, from FBS Financial for $1,105,000.00, of which $847,000.00 was paid on the note to TFMR. Shortly after development began, an energy crisis developed and inflation increased rapidly. The estimated cost of the planned club house went from $275,000.00 to $550,-000.00, and the cost of most of the other development plans increased in a like manner. TFMR refused to advance the funds for the club house because the contingency fund provided for in the loan was not sufficient to cover the cost increase, and the total projected development cost exceeded the available funds. With development stalled and problems in the national economy adversely affecting the land development market, F L R was in financial difficulty. Tax liens were filed on the ranch in the Spring of 1974. A number of property owners sued F L R when promised development was stopped. Defaults occurred under the deed of trust when lots were transferred without releases from TFMR and when second and third liens were placed on some of the land. The ranch operations were losing money each month, and it finally became necessary for TFMR to pay some monthly bills for operations to continue.



On May 13, 1974, TFMR posted notices for a trustee's sale on June 4, 1974. Late in the afternoon on June 3, 1974, F L R filed suit in Houston seeking a restraining order to enjoin the sale. Before the order was granted, counsel for TFMR appeared and requested a hearing. The district judge agreed to hear the matter the following morning. That evening, Mr. Olivere and his attorney flew to Brady and shortly after midnight, District Judge A. P. Allison granted a temporary restraining order. When counsel for TFMR arrived for the hearing in Houston on June 4, they were advised that F L R was taking a nonsuit. After learning of the order issued by Judge Allison, they requested a hearing which was set for that afternoon. While they were flying from Houston to Brady, counsel for F L R was flying back to Houston, unaware of the hearing scheduled for later in the day. At about 3:15 p.m., Judge Allison had a conference call with the attorneys in Houston for F L R and the attorneys for TFMR in Brady. At the conclusion of the "telephone hearing", the temporary restraining order was dissolved. Judge Allison had previously authorized the trustee to start reading the notice of sale. At 3:45 p.m., he authorized the completion of the sale. The sale was concluded at about 3:58 p.m., with TFMR bidding $950,000.00. Mr. Olivere actually bid $5,000.00 more, but he did not have any funds to complete the purchase.

Thereafter, F L R was dispossessed and TFMR took possession of the ranch. Subsequently, F L R filed this suit for title and possession of the ranch and damages. TFMR answered and filed a counterclaim for a declaratory judgment as to the validity and effect of the trustee's deed, a deficiency judgment and order to enjoin F L R from interfering with TFMR's ownership, possession and

control of the Flying L Ranch. The claim for a deficiency judgment was nonsuited during trial. Following a jury verdict, judgment was entered that the trustee's deed was valid and effective to convey title to TFMR, and it was ordered that F L R take nothing on its claim for title and possession of the ranch.

By its first point, F L R complains of the trial Court's judgment on the trespass to try title issue in the case and urges that it has shown a superior title and possession from which it was forcibly evicted by TFMR. At the conclusion of F L R's case, the Court granted a motion for instructed verdict as to the 167-acre tract because the evidence established that F L R had previously parted with its title by a deed to Mr. Olivere, trustee for Majestic Garage Corporation. Having passed title to a third party and placed them in possession, F L R could not contend that it had possession up to the time that it was dispossessed in June, 1974, following the trustee's sale. Continuous possession was essential to its claim by reason of its prior possession. Land v. Turner, 377 S.W.2d 181 (1964). Thus, we conclude that the trial Court properly granted the motion for instructed verdict as to the 167-acre tract.

A more difficult question arises as to the proof of title to the 541-acre tract. F L R made its claim of title from a common source by attempting to show that TFMR was holding under F L R. Temple Lumber Co. v. Arnold, 14 S.W.2d 926 (Tex. Civ. App.—Beaumont 1929, writ dism'd); Jones v. Parker, 193 S.W.2d 863 (Tex. Civ. App.— Texarkana 1946, writ ref'd n.r.e.). As proof, it offered the deed of trust, dated February 28, 1973, given by F L R to secure the $3,000,000.00 loan to TFMR and then offered the substitute trustee's deed



"* * * not for proof of title, but for the proof of common source only, and for that limited purpose under the rules." See Rule 798, Tex.R.Civ.P. Although the exhibit is marked as Plaintiff's Exhibit 31 and Defendant's Exhibit 34, it was never offered by Defendant-Appellee as proof of its title. Mr. Blodgett, the substitute trustee, did testify as to the sale and the subsequent execution and filing of the deed. But, as a general rule, an interest in real property can be established only by a valid written instrument and not by parol evidence. City of Mission v. Popplewell, 156 Tex. 269, 294 S.W.2d 712 (1956); 56 Tex.Jur.2d, Trespass to Try Title, Section 125.

The general rule with regard to an instrument offered for a limited purpose is set forth in 56 Tex.Jur.2d, Trespass to Try Title, Section 128, as follows:

> "The Plaintiff has the right to introduce evidence for the purpose only of proving a common source of title, and where this is done, such evidence will not be considered for the purpose of showing title in the defendant, unless the evidence is introduced by him. This principle is also set forth by rule, where proof of common source is made by plaintiff by certified copies of deeds, as authorized. The result is that proof of common source may be made and yet, there may be no evidence of title in the defendant. * * *"

This principle has been recognized and applied in cases holding that instruments showing a common source of title will not be considered for the purpose of showing title in the defendant, unless it is offered by him. Bosse v. Cadwallader, 86 Tex. 336, 24 S.W. 798 (1894); Young v. Trahan, 97 S.W. 147 (Tex. Civ. App. 1906,

writ ref'd); Davis v. Gale, 160 Tex. 309, 330 S.W.2d 610 (1960).

In Hovel v. Kaufman, 280 S.W. 185 (Tex. Comm'n App. 1926, opinion adopted), the Court commented upon the language used in the Bosse case, and said:

> "The correct rule is that, whenever a plaintiff, in a suit in trespass to try title, undertakes to sustain his claim of title by proof of common source, he must show, in order to make a prima facie case for himself, not only that both he and the defendant claim title under a common source, but also must show that the title emanating from the common source which the plaintiff claims is superior to that claimed by defendant, *and that plaintiff holds such title.* * * *" (Emphasis added).
>
> * * *
>
> "The plaintiff in error having failed to show, before she rested her case, that she held the title to the land, the defendant in error was not placed under the necessity of introducing any proof at all, and the trial court properly instructed a verdict for the latter."

That decision was followed in Tate v. Johnson, 140 S.W.2d 288 (Tex. Civ. App.—Fort Worth 1940, writ dism'd jdgmt cor.), where the Court said:

> "It is contended that the court erred in entering judgment against plaintiff on the evidence introduced by plaintiff showing title in another, when the instruments were only offered for the purpose of showing common source. * * *"
>
> * * *



> "* * * While in this case plaintiff did not trace the title into defendants, but he did, by his evidence, show that title had been divested out of himself.
>
> "Plaintiff relies upon Article 7382, R.C.S., which in effect provides that evidence introduced by plaintiff to show common source cannot be considered as evidence of a title in defendant unless offered by him, yet in Hovel v. Kaufman, Tex. Com. App., 280 S.W. 185, at page 188, it was said: 'But this statutory provision in no wise precludes a consideration of such evidence for the purpose of determining if the plaintiff has discharged the burden of proving that he really has title to the land as he claims to have.'
>
> "It is a well settled rule of law in this State that in trespass to try title, plaintiff must recover, if at all, upon the strength of his own title. The burden is upon him to prove a prima facie right of title and possession; if he fails to discharge that burden he cannot recover, and where defendant is shown to be in possession, as in this case, judgment will be entered for the defendant. * * *"

Thus, we conclude that the trustee's deed which was offered for a limited purpose did not establish title in TFMR, but it did prove that F L R had parted with its title to the Ranch. Thus, having no title, it could not recover in this case.

There is yet another reason why the Appellant cannot prevail under the facts in this case. In Jasper State Bank v. Braswell, 130 Tex. 549, 111 S.W.2d 1079 (Tex. Comm'n App. 1938, opinion adopted), the Court in an opinion by Commissioner Smedley said:

> "* * * It is settled in this state that a mortgagee who has purchased the land at foreclosure sale,

> irregular or void as to the mortgagor (or as to one having title under the mortgagor), and who has taken possession under and in reliance upon such foreclosure and purchase, may retain possession against the suit of the mortgagor, or one holding under him, until his debt is paid. * * *"

The same result was reached in another opinion by Commissioner Smedley in Connor Bros. v. Williams, 130 Tex. 572, 112 S.W.2d 709 (Tex. Comm'n App. 1938, opinion adopted). Both of those cases were followed in Willoughby v. Jones, 151 Tex. 435, 251 S.W.2d 508 (1952), where Justice Garwood writing for the Court said:

> "* * * Although admittedly the petitioner upon his foreclosure purchase went into possession of the lands described in the petition of the respondents in the present case and is still in possession, respondents have not made a tender of the mortgage debt, which, at least in the ordinary case of a mortgage in possession under a foreclosure void as to the mortgagor-plaintiff, would be a necessary prerequisite for a successful title action by the latter against the former. Jasper State Bank v. Braswell, 130 Tex. 549, 111 S.W.2d 1079, 115 A.L.R. 329; Connor Bros. v. Williams, 130 Tex. 572, 112 S.W.2d 709."

To the same effect are the holdings in Dyess v. West's Estate, 257 S.W.2d 737 (Tex. Civ. App.—Galveston 1953, writ ref'd n.r.e.); Edinburgh Theatres, Inc. v. Richter, 367 S.W.2d 354 (Tex. Civ. App.—San Antonio 1963, no writ); Whalen v. Etheridge, 428 S.W.2d 824 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.). The first point of error is overruled.



F L R next contends that the trustee's sale was invalid for several reasons which we shall note. First, it is contended that there was no notice of default, acceleration and foreclosure presented to F L R. On August 6, 1973, a letter was written to F L R advising of default. On December 6, 1973, another letter was written with regard to default. In addition to the written notices, there is substantial evidence of oral notice of default at other times prior to the foreclosure. The issue of acceleration was removed from the suit when TFMR took a nonsuit on its counterclaim for a deficiency judgment. The final judgment in this case did not provide for recovery of any sum of money and thus, there is no issue of acceleration and recovery for the full amount due on the note. With regard to notice of foreclosure, the evidence is undisputed that the substitute trustee did post the notices as provided for in the deed of trust. All of the claims with regard to lack of notice are without merit.

Next, it is urged that Bill Blodgett, the substitute trustee, was not of the same quality and independent character as the original trustees. As shown by the evidence, he was an agent and attorney for TFMR. The jury failed to find that, while acting as substitute trustee, he was under the exclusive direction and control of TFMR. There is no attack as such upon that answer. The evidence indicates that he was properly appointed, complied with the law in conducting the sale, and the sale is not invalid because of any acts upon his part as trustee under the deed of trust.

It is further urged that the sale was invalid because it was commenced before the temporary restraining order was dissolved. Because of the action taken by F L R

in deciding to go to Brady to get the temporary restraining order, rather than have the scheduled hearing in Houston, it was necessary for Judge Allison to act on short notice once a hearing was requested. He specifically authorized the trustee to commence reading the notice of sale and lengthy property description before the temporary restraining order was dissolved. Otherwise, the hearing would have been an exercise in futility because the notice and description could not have been read after the hearing was concluded at 3:45 and the sale completed by 4:00 p.m. as required by law. The controlling point is the fact that the jury found that the Court dissolved the temporary restraining order at 3:45 p.m. and the sale was completed at 3:58 p.m. No attack is made on those findings.

Lastly, it is contended that the consideration bid by TFMR was grossly inadequate. The jury failed to find that the trustee received grossly inadequate consideration for the property. We cannot say that such answer is clearly wrong, nor that an affirmative answer was established as a matter of law. It must be remembered that all construction had stopped, many promises to property owners were unfulfilled, the sale of lots had practically ceased, suits and liens had been filed and the project development was no longer viable. Point of error, number II, is overruled.

F L R next contends that the trial Court erred in issuing its verbal order dissolving the temporary restraining order. We find the point does not present reversible error for several reasons. First, at the time the temporary restraining order was signed, no pleadings had been filed and none were filed in Judge Allison's Court until 9:10



a.m. the next morning. At that time, there was pending an identical suit in the 190th District Court in Harris County. "The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." Curtis v. Gibbs, 511 S.W.2d 263 (Tex. 1974). Judge Allison, as a witness in this case, testified that he was not told at the midnight meeting that an identical suit was filed, and in fact set for hearing in Houston the next morning. In order to recognize that dominant jurisdiction, he took the only course available to him, and that was to dismiss the temporary restraining order. Of course, at that time the Houston suit had been nonsuited, and F L R was left with no case or time to seek a temporary restraining order before the sale was completed. But it was their choosing to file one suit, leave it and go elsewhere for relief and not tell the judge in Brady of the pending suit in Houston. Having made this bed, they must now sleep in it.

Rule 680, Tex. R. Civ. P., permits the adverse party, on such notice as the Court may prescribe, to move to dissolve the temporary restraining order and requires the Court to determine such motion as expeditiously as the ends of justice require. We believe the District Judge did as the rule requires, recognizing the position he had been placed in after learning of the Houston suit and the unavailability of counsel for F L R. At the conclusion of the telephone conference call, he determined that the temporary restraining order should be dissolved. One of the exhibits identified by Judge Allison was a copy of the order dissolving the temporary restraining order, bearing Judge Allison's signature, and reciting that the tempo-

rary restraining order was set aside and dissolved as of 3:45 p.m. on June 4, 1974. We find no error in the entry of that order. Point of error, number III, is overruled.

The next seven points are all presented without any citation of authority in support of them, but, nevertheless, we shall consider and pass on each of the points. The fourth point complains of the jury's answers to Special Issues 12 and 13 and urges that those answers should be disregarded and this Court determine that the price bid at the sale was grossly inadequate. As previously noted, the jury in Issue 12 failed to find that the price bid at the trustee's sale was grossly inadequate consideration. The negative answer only means that F L R failed to carry its burden of proof on the issue. C. & R. Transport, Inc. v. Campbell, 406 S.W.2d 191 (Tex. 1966). The contrary has not been established as a matter of law. Issue No. 13 as to market value was improperly worded, and the answer is meaningless, but it was an issue requested by F L R and to which it made no objection either to the issue or the answer. Thus, no error is presented. The point is overruled.

The next point urges that the trial Court erred in not disregarding the answer to Special Issue No. 2. The issue inquired if F L R submitted plans, specifications and cost of improvements for a club house to TFMR in June, 1973. The jury answered in the negative. Again, the answer only means a failure to carry the burden of proof on the issue. Although there was evidence to support an affirmative answer, we cannot say that such answer was established as a matter of law. Point of error, number V, is overruled.



Point of Error, number VI, contends the trial Court erred in submitting Special Issues Nos. 15-26. First, the point is multifarious in attacking eleven unrelated issues. Chemical Cleaning, Inc. v. Chemical Cleaning and Equipment Service, Inc., 456 S.W.2d 724 (Tex. Civ. App.—Beaumont), writ ref'd n.r.e. per curiam 462 S.W.2d 276 (Tex. 1970); Holzapfel v. Brueggman, 404 S.W.2d 916 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.). The argument only relates to three or four of the issues, and no authority is cited in support of the contention. The Appellant's objections to the charge are not included in the transcript with the judge's endorsement thereon as required by Rule 272, Tex.R.Civ.P., in a case tried prior to January 1, 1976. No reversible error is shown. The point is overruled.

Point of error, number VII, complains of a failure to grant a mistrial during voir dire examination. There is no assignment of such error in the motion for new trial, and the complaint has been waived. Rules 324 and 325, Tex.R.Civ.P. The point is overruled.

The next two points urge error as shown at a hearing on jury misconduct. It does not reasonably appear from the evidence, both at the hearing of the motion and the trial of the case and from the record as a whole, that injury probably resulted to FLR. Rule 327, Tex.R.Civ.P. Where the trial Court, in ruling on a motion for new trial based upon jury misconduct, does not file express findings, it will be presumed on appeal that the Court found all controverted facts in support of the judgment overruling the motion for new trial, and that no misconduct occurred. Brungs v. Consolidated Plan Service, Inc., 529 S.W.2d 79 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). Points of error VIII and IX are overruled.

The Appellant's tenth and final point complains that the trial Court erred in failing to grant a new trial on the basis of newly discovered evidence following the hearing on the motion for new trial. The motion is made with regard to the testimony of the one juror who signed an affidavit in connection with the claim of jury misconduct and which was attached to the motion for new trial. This juror was not one of the ten who signed the jury verdict. We have considered the contentions presented by the motion, and conclude that the trial Court did not err in overruling the motion. The point of error is overruled.

The judgment of the trial court is affirmed.

/s/ MAX N. OSBORN
Max N. Osborn, Associate Justice

August 18, 1976



## APPENDIX B

## Orders Of Supreme Court Of Texas

IN THE
SUPREME COURT OF T EXAS

NO. B-6346

May 4, 1977

F L R CORPORATION

v.

BILL BLODGETT, TRUSTEE ET AL.

From Bandera County, Eighth District

Application of petitioner for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant F L R Corporation, and its surety, Lawyers Surety Corporation, pay all costs incurred on this application.

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June 8, 1977

NO. B-6346

F L R CORPORATION

v.

BILL BLODGETT, TRUSTEE ET AL.

From Bandera County, Eighth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

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I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 24th day of June, 1977.

GARSON R. JACKSON, Clerk

By H. ZANE BECK, Deputy.
H. Zane Beck



## APPENDIX C

## Notice Of Appeal

NO. 6516

IN THE
COURT OF CIVIL APPEALS
FOR THE EIGHTH SUPREME JUDICIAL DISTRICT
OF TEXAS
AT EL PASO, TEXAS

---

F L R CORPORATION, Appellant

v.

BILL BLODGETT, TRUSTEE and
TEXAS FIRST MORTGAGE REIT,
TEXAS FIRST MORTGAGE REIT, Appellees

---

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that F L R Corporation, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of this Court in affirming the lower Court which Judgment was appealed to the Supreme Court of Texas by Application for Writ of Error which Application was denied and Motion for Rehearing upon said application for Writ of Error having been overruled by the Supreme Court of Texas on the 8th day of June, 1977.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted this 16th day of June, 1977.

/s/ WENDELL S. LOOMIS
Wendell S. Loomis
Attorney for FLR Corporation
1012 Esperson Building
808 Travis
Houston, Texas 77002
(713) 225-0761

## CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing document was delivered to the following parties on the date and at the addresses indicated:

VINSON, ELKINS, SEARLS, CONNALLY & SMITH

Mr. Kenneth E. Johns, Jr.
First City National Bank Bldg.
Houston, Texas 77002



THE METHOD OF DELIVERY WAS AS FOLLOWS:

X Certified Mail, Return Receipt Requested
Regular Mail
Delivery in Person

Delivery To: _____

For: _____

Dated: June 16, 1977

/s/ WENDELL S. LOOMIS
Wendell S. Loomis
Esperson Building, Suite 1012
808 Travis
Houston, Texas 77002
(713) 225-0761

## APPENDIX D

## Rule 680, T.R.C.P.

### Rule 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice



to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

## APPENDIX E

### Article 3810, V.A.C.S.

Art. 3810. [3759] [2369] [2310a] Sales under deed of trust

All sales of real estate made under powers conferred by any deed of trust or other contract lien shall be made in the county in which such real estate is situated. Where such real estate is situated in more than one county then notices as herein provided shall be given in both or all of such counties, and the real estate may be sold in either county, and such notice shall designate the county where the real estate will be sold. Notice of such proposed sale shall be given by posting written notice thereof for three consecutive weeks prior to the day of sale in three public places in said county or counties, one of which shall be made at the courthouse door of the county in which such sale is to be made, and if such real estate be in more than one county, one at the courthouse door of each county in which said real estate may be situated, or the owner of such real estate may, upon written application, cause the same to be sold as provided in said deed of trust or contract lien. Such sale shall be made at public vendue between the hours of 10 o'clock a.m. and 4 o'clock p.m. of the first Tuesday in any month. When any such real estate is situated in an unorganized county, such sale shall be made in the county to which such unorganized county is attached for judicial purposes. Acts 1889, p. 143; G.L. vol. 9, p. 1171; Acts 1st CS 1915, p. 32; Acts 1915, p. 84.



## APPENDIX F

### Temporary Restraining Order

NO. 237

F L R CORPORATION

v.

BILL BLODGETT, TRUSTEE and
TEXAS FIRST MORTGAGE REIT

IN THE DISTRICT COURT OF
BANDERA COUNTY, TEXAS
198th JUDICIAL DISTRICT

On the 3rd day of June, 1974, came on to be heard Plaintiff's Application for Temporary Restraining Order, and came the Plaintiff by its agents and Attorney and the Court, there being no time for notice to Defendant, proceeded to consider Plaintiff's verified application and the arguments of Counsel and finding that Plaintiff will suffer irreparable injury if Defendant Texas First Mortgage REIT is allowed to foreclose its Deed of Trust on the property therein described and that Defendant would not be injured or inconvenienced by a temporary delay, the Court was of the opinion that the application of Plaintiff should be granted and it was accordingly

ORDERED that Texas First Mortgage REIT and Bill Blodgett shall be and are hereby temporarily restrained and enjoined from conducting Trustee's Sale upon the property of FLR Corporation described in Exhibit A of said Application and it was further

ORDERED that Plaintiff make bond of good and sufficient sureties in the sum of $5,000.00 to be approved by the Clerk of the Court, and it is further

ORDERED that hearing hereon for temporary restraining order pending this suit shall be had before this Court at 10 a.m. on 11th of June, 1974.

RENDERED and SIGNED this the 4th day of June, 1974 at 12:15 o'clock p.m.

A. P. ALLISON
Judge Of Said Court



NO. 237

F L R CORPORATION

v.

BILL BLODGETT, TRUSTEE and
TEXAS FIRST MORTGAGE REIT

IN THE DISTRICT COURT OF
BANDERA COUNTY, TEXAS
198th JUDICIAL DISTRICT

## B O N D

WHEREAS in the above entitled and numbered cause, plaintiff was granted a temporary restraining order against defendants, and, in the order granting such temporary restraining order, the Court required plaintiff to file with the Clerk a bond in the sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.) payable to said defendants, approved and conditioned as the law requires;

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we, as Principal, and the other undersigned hereto as sureties, acknowledge ourselves bound to pay to the adverse party in the above entitled and numbered cause, the sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.) conditioned that applicant and plaintiff in such cause, will abide by the decision which may be made in such cause, and that it will pay all sums of money and costs that may be adjudged against it if

the temporary restraining order shall be dissolved in whole or in part.

WITNESS, our hands this 4th day of June, 1974.

By /s/ R. R. OLIVERE
FLR Corporation
R.R. Olivere, Agent &
Attorney In Fact

By /s/ WENDELL S. LOOMIS
Lawyers Surety Corp.
Wendell S. Loomis
Attorney In Fact

APPROVED AND FILED this 4th day of June, 1974

/s/ OLGA SCHMIDT
District Clerk, Bandera County, Texas